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|---|--|--|
| NAME:<br>KEITH CROSBY<br>REG. NO. 29802-066   |  | 4. CV-00.2211  |
| ADDRESS:<br>F.C.I. ALLENWOOD<br>P.O. BOX 2000<br>WHITEDEER, PA 17887  |  |  |
| or PLACE OF CONFINEMENT & PRISON NUMBER<br><br>Note: If represented by an attorney, his name, address & telephone number<br><br>Note: It is your responsibility to notify the Clerk of the Court, in writing of any change of address |  |  |
| <i>United States District Court</i>   |  |  |
| FULL NAME: (include name under which you were convicted)<br>KEITH CROSBY, <i>Petitioner,</i><br><br>vs.   |  | CASE NO: _____<br>(To be supplied by the clerk of the United States District Court)      |
| NAME OF WARDEN (or other authorized person having custody of petitioner)<br><br><i>Respondent.</i>  |  | PETITION FOR WRIT OF HABEAS CORPUS<br>BY A PERSON IN FEDERAL CUSTODY<br>28 U.S.C. § 2241 |

## INSTRUCTIONS - READ CAREFULLY

This petition shall be legibly handwritten or typewritten, signed by the petitioner, under penalty of perjury. You must set forth *CONCISELY* the answer to each question in the proper space on the form. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury.

You must not attach separate pages to this except that *ONE* separate additional page is permitted in answering Question No. 9.

FILED  
CORANTON  
DEC 20 2000

*DMC*  
DEPUTY CLERK

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN FEDERAL CUSTODY

Upon receipt of a fee of \$5.00, your petition will be filed if it is in proper order.

If you are seeking leave to proceed in forma pauperis (without paying the \$5.00 fee and other court costs), then you must also execute the declaration on the last page, setting forth information which establishes your inability to pay the fees and cost of the proceedings or to give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds \$25.00, you must pay the filing fee as required by the rule of the district court.

When the petition is completed, the *original and two copies* must be mailed to the Clerk of the United States District Court for the

Only one sentence, conviction or parole matter may be challenged in a single petition. If you challenge more than one, you must do so by separate petitions.

Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PLEASE COMPLETE THE FOLLOWING: (check appropriate number)

This petition concerns:

1. ☐ a conviction
2. ☐ a sentence
3. ☐ jail or prison conditions
4. ☐ prison discipline
5. ☒ a parole problem
6. ☐ other

## PETITION

1. Place of confinement F.C.I. ALLENWOOD (MED)
2. Name and location of court which imposed sentence U.S. PAROLE COMMISSION
3. The indictment number or numbers (if known) upon which, and the offense or offenses for which, sentence was imposed:
  - (a) PAROLE REVOCATION: NEW CONDUCT WAS NOT CHARGED.
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
4. The date upon which sentence was imposed and the terms of the sentence:
  - (a) DECEMBER 5, 1995
  - (b) ORDERED TO SERVE 10 YEARS OF REMAINING 17 YEAR PAROLE BACK UP.
  - (c) \_\_\_\_\_
5. Check whether a finding of guilt was made:
  - (a) ☐ After a plea of guilty
  - (b) ☐ After a plea of not guilty
  - (c) ☐ After a plea of nolo contendere
6. If you were found guilty after a plea of not guilty, check whether that finding was made by:
  - (a) ☐ a jury
  - (b) ☐ a judge without jury
7. Did you appeal from the judgment of conviction or the imposition of sentence?
 

☒ Yes      ☐ No
8. If you did appeal, give the following information for each appeal:
  - (a)(1) Name of Court NATIONAL PAROLE BOARD
  - (2) Result CONTINUED TO PRESUMPTIVE PAROLE UNTIL AFTER 120 MONTHS
  - (3) Date of Result MAY 3, 1994
  - (4) Citation or number of opinion N/A

(5) Grounds Raised (*list each*) \_\_\_\_\_

- (A) Mitigating circumstances justified different decision.  
 (B) Decision was based on erroneous information.  
 (C) More lenient decision should have been rendered on grounds  
 (D) of fairness.

(b)(1) Name of Court \_\_\_\_\_ (Same as set forth in number 8)

(2) Result \_\_\_\_\_

(3) Date of result \_\_\_\_\_

(4) Citation or number opinion \_\_\_\_\_

(5) Grounds raised (*list each*)

(A) \_\_\_\_\_

(B) \_\_\_\_\_

(C) \_\_\_\_\_

(D) \_\_\_\_\_

CAUTION: If you are attacking a sentence imposed under a federal judgment, you must first file a direct appeal or motion under 28 U.S.C. § 2255 in the federal court which entered judgment.

9. State *CONCISELY* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, attach a *SINGLE* page only behind this page.

CAUTION: If you fail to set forth all grounds in this petition, you may be barred from presenting additional ground at a later date.

- (a) Ground One PAROLE REVOKED BASED ON FABRICATED INFORMATION IN  
VIOLATION OF PETITIONER'S FIFTH AMENDMENT.

Supporting *FACTS* (tell your story *BRIEFLY* without citing cases or law).

CAUTION: You must state *facts not conclusions* in support of your grounds. A rule of thumb to follow is - who did exactly what to violate your rights at what time or place.

(SEE PRECEDING PAGE FOR SUPPORTING FACTS)

**SUPPORTING FACTS:**

During petitioner's December 5, 1993, parole revocation hearing, the commission's witness Rodney Scott a/k/a Yaku Shaka fabricated petitioner's involvement in a April 26, 199, Maryland Permanent Bank & Trust Company bank robbery, that was not connected with or to a July 16, 1993, bank robbery that included himself and subject Toney Wilder, who conceded to and pleaded guilty in relation. No new conduct was brought against petitioner based on Mr. Scott's incriminating statements. As a result, petitioner was ordered by the commissioner to serve 10 years of a remaining 17 year parole back-up. Petitioner claims he is innocent of the alleged crime Mr. Scott implicated him in before the commissioner. And in further support of petitioner's position, the attached sworn affidavits, herewith as Exhibits A & B, which have been supplied by Mr. Scott and Mr. Wilder, exonerates petitioner's alleged involvement in the crime charged by Mr. Scott before the commissioner. Wherefore, petitioner requests an evidentiary hearing on the merits of his innocence and the substantiated sworn affidavits, or in the alternative, that he be immediately released from federal custody, or any other relief the court may deem appropriate.

**NOTE:** Because the U.S. Parole Commission has failed to respond to or act on petitioner's request for relief at this point of his incarceration, based on the newly discovered information supplied

by the aforementioned individuals, pursuant to 28 C.F.R. § 2.28 (Reopening of Cases), petitioner has no other alternative but to turn towards the court for the appropriate relief and disposition he seeks in resolving this matter in the interest of justice. (see Exhibit C)

10. Have you ever filed previous petitions for habeas corpus, motions under Section 2255 of Title 28, United States Code, or any other applications, petitions or motions with respect to this conviction?  
☐ Yes ☒ No

11. If your answer to Question No. 10 was yes, give the following information:

- (a)(1) Name of Court N/A  
 (2) Nature of proceedings \_\_\_\_\_  
 (3) Grounds raised \_\_\_\_\_  
 \_\_\_\_\_  
 (4) Result \_\_\_\_\_  
 (5) Date of Result \_\_\_\_\_  
 (6) Citation or numbers of any written opinions or orders entered pursuant to each disposition.  
 \_\_\_\_\_

- (b)(1) Name of Court \_\_\_\_\_  
 (2) Nature of proceedings \_\_\_\_\_  
 (3) Grounds raised \_\_\_\_\_  
 \_\_\_\_\_  
 (4) Result \_\_\_\_\_  
 (5) Date of Result \_\_\_\_\_  
 (6) Citation or numbers of any written opinions or orders entered pursuant to each disposition.  
 \_\_\_\_\_

12. If you did not file a motion under Section 2255 of Title 28, United States Code, or if you filed such a motion and it was denied, state why your remedy by way of such motion is inadequate or ineffective to test the legality of your detention.

N/A

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN FEDERAL CUSTODY

13. Are you presently represented by counsel? ☐ Yes ☒ No

If so, name address and telephone number \_\_\_\_\_

Case name and court \_\_\_\_\_

14. If you are seeking leave to proceed in *forma pauperis*, have you completed the declaration setting forth the required information?

☒ Yes ☐ No,

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

\_\_\_\_\_  
*Signature of Attorney (if any)*

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on Nov. 20th. 2000  
(date)

Keith Grosby #29802-066  
*Signature of Petitioner*



IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KEITH CROSBY

v.

WARDEN MICHAEL ZENK  
F.C.I. ALLENWOOD

Case No.

ATTORNEY'S FOR PETITIONER: KEITH CROSBY, Pro se  
ATTORNEY'S FOR RESPONDANT: ATTORNEY GENERAL JANET RENO, Esq.

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

KEITH CROSBY, Petitioner, is not professionally trained to litigate this petition, he has maintained his innocences from the beginning and a miscarriage of justice does exist. Petitioner's release would not depreciate the seriousness of this offense or jeopardize the public welfare, should this Court grant habeas corpus relief.

Petitioner, prays that this Court rule on the merits of this petition and not continue a miscarriage of justice by procedurally barring the petitioner's pro se petition because it is improperly drafted and does not meet the stringent standards than formal papers drafted by lawyers. See Haines v. Kerner, 404 U.S. 519, 520-521 (1972).

#### JURISDICTION

This Court has jurisdiction to entertain, rule on the merits, and grant relief in claim number one and claim number two under 28 U.S.C. § 2241. The petitioner is "in custody" in violation of the Constituion, laws or treaties of the United States. [28 U.S.C. § 2241.

#### JUDGEMENT REQUESTED

Pursuant to section 2241 proceedings, petitioner ask this Honorable Court to ORDER an evidentiary hearing where he can prove the allegations herein by: (A) petitioner's own testimony; (B) the testimony of respondent's witnesses; (C) additional evidence; and (D) legal argument to be presented at the hearing.

Upon proof of petitioner's allegations herein, petitioner ask this Court to: ORDER that the petition for Writ of Habeas Corpus be granted.

VERIFICATION

The facts set forth herein that are based on the personal knowledge of the petitioner are true and correct. The rest of the allegations are pleaded on information and belief.

Signed under penalty of perjury under 28 U.S.C. 1746 this 20<sup>TH</sup> day of NOVEMBER 2000.

Keith Crosby #29802-066  
KEITH CROSBY

ISSUE PRESENTED

- 1) Whether the petitioner is "in custody" in violation of the Constitution, laws or treaties of the United States.
- 2) Whether there has been a denial of "Due Process" in violation of the Constitution of the United States.

BACKGROUND

In May, 1986, petitioner was sentenced to a term of imprisonment of twenty-five (25) years for bank robbery and use of a firearm during a crime of violence.

On February 2, 1993, the United States Parole Commission ordered him released on supervised parole until December 2, 2010. Thereafter, in a letter dated August 10, 1993, Crosby's pro-

bation officer informed the Commission that he had violated the conditions of his parole and recommended that a violator's warrant for his arrest be issued.

Specifically, the Commission was advised that petitioner, who was subject to drug aftercare conditions of parole, had recently twice tested positive for drugs, failed to make six drug treatment appointments, and was implicated, according to information obtained by the Federal Bureau of Investigation (FBI), in a number of bank robberies between April and July, 1993.

As a result petitioner was charged with violating the conditions of his parole as follows: Committing armed bank robbery; failing to notify his probation officer of his criminal involvement; associating with persons having a criminal record and/or engaged in criminal activity; use of dangerous and habit forming drugs; failing to keep scheduled appointments required pursuant to his special parole condition of drug aftercare in a warrant application dated August 24, 1993. He was later charged with the additional violation of unauthorized possession of a firearm.

Following petitioner's arrest, he was given a preliminary interview on September 3, 1993 during which he admitted to the drug and special aftercare program violations but denied all other charges. In a letter dated October 5, 1993, he was notified that probable cause had been found on the following charges: armed bank robberies; failure to notify the United States Probation

Office (U.S.P.O.) of criminal involvement: association with persons having criminal record/engaged in criminal activity; use of dangerous and habit forming drugs; violation of special condition; and unauthorized possession of firearm. That letter also advised petitioner that three adverse witnesses would be subpoenaed to appear at the revocation hearing, namely Glenn Graves, Federal Bureau of Investigation (FBI), Rodney Scott, and detective sergeant George Cunnigham. Additionally, under cover of that letter petitioner was provided with copies of the warrant dated August 24, 1993, warrant application dated August 24, 1993, the supplement date 10/5/93, the preliminary interview summary report date 9/3/93, and the probation officer's 8/10/93 letter with the supporting FBI affidavit and PharmChem lab reports.

A local revocation hearing, at which petitioner was represented by counsel, was held on December 1, 1993. Although petitioner had not requested any witnesses, the Commission called FBI agent Graves, U.S. Probation Officer Walter Dent, and Rodney Scott as adverse witnesses. During the hearing petitioner admitted to the charge of drug use but denied all other charges, including possession of a firearm. Testimony from FBI agent Graves indicated that during April through July 1993 he investigated a series of bank robberies which were all committed by three black males with ski masks, one of whom would count the time out side. According to Graves in May, 1993 he was advised by an informant that petitioner had participated in these robberies with two

other persons he had been incarcerated with. Following a robbery on July 16, 1993, two males were arrested, Rodney Scott (a.k.a. Yaqub Shaka) and Tony Wilder. Scott implicated himself in three bank robberies in Maryland and also stated that petitioner and Wilder were participants in the robbery which took place on 4/26/93 at the Maryland Permanent and Trust Company. Additionally, Graves testified that during a consent search of Wilder's residence papers were uncovered which contained the phone number of the place where petitioner was residing at the time. Agent Graves also testified that a video of another bank robbery "showed a person similar to petitioner carrying a revolver", and that an informant had informed the FBI that petitioner had admitted his participation in a bank robbery prior to the arrests of Scott and Wilder to people close to him.

The Commission also heard from Scott, who . . . indicated he had known the subject [Crosby] for over 12 years. He indicated that he was confined with subject and since he had been on parole he had contact with petitioner about two times a week. He indicated that subject was involved in a robbery with him on 4/26/93. The hearing examiner concluded that petitioner had committed the bank robbery as well as the other offenses charged and recommended that his parole be revoked with credit for time spent from 2/3/93 through 8/31/93, and that he continue to a presumptive parole after service of 70 months (7/1/99) with special drug after-care condition.

On December 16, 1993, the Commission issued a Notice of Action. The Notice indicated that the Commission had found as a fact that petitioner had violated conditions of his parole as charged based upon the testimony of agent Graves, Scott and the documentation submitted by the U.S. Probation Officer dated revoked, that he can be credited with the time spent on parole from the time of his release until August 31, 1993, and that he continue to a presumptive parole after service of 120 months (September 1, 2003) was special aftercare drug condition. In support of its decision to require service of 120 months, an amount above petitioner's guideline range of 60 - 72 months, the Commission stated as follows:

Your parole violation behavior has been rated as new criminal conduct of category five severity because it involved ban robbery. Your new salient factor score is 3. You have been in federal confinement as a result of your violation behavior for a total of 3 months. Guidelines established by the Commission indicate a customary range of 60 - 72 months to be served before release. After review of all relevant factors and information presented, a decision above the guidelines appears warranted because you are a more serious risk than indicated by your salient factor score in that you have a history of assaultive behavior as evidenced by conviction for assault with intent to rob (1973); bank robbery 1978; and bank robbery (1986). You were on parole for approximately two months when you became involved in a new robbery offense. When apprehended by the U.S. Marshals you were found to be in possession of a handgun.

Petitioner appealed this decision to the National Appeals Board (Appeals Board) on the ground that "...there

was insufficient evidence to support the findings that [he] robbed a bank on April 26, 1993, associated with a person who has a criminal record, and possessed a firearm without proper authorization." On July 27, 1994, the Appeals Board issued a Notice of Action Appeal affirming the Commission's decision. A statutory interim hearing was held on December 5, 1995, following which the Commission issued a Notice of Action dated January 18, 1996 indicating no charge in the previous determination that petitioner serve to a presumptive parole date of 9/1/2003. This decision was also appealed to the Appeals Board, Which by Notice of Action on Appeal dated November 1, 1996, indicated its affirmance of the interim decision as no new information had been provided which warranted any change since the initial decision.

Subsequently, by letter dated May 28, 1997, petitioner requested that his case be reopened pursuant to 28 C.F.R. § 2.28 on the basis of newly discovered evidence. Specifically, he contends that since his initial revocation hearing Scott had recanted his testimony concerning petitioner's involvement in the bank robbery of April 26, 1993 and attached Scott's affidavit so stating. Additionally, also attached to the letter was an affidavit executed by Tony Wilder, who had himself been arrested and convicted of bank robbery, which stated that he plead guilty to bank robbery based on potential incriminating testi-



mony of Scott, that he was aware Scott had implicated petitioner in the bank robbery along with Wilder but that petitioner "...was not involved in any robberies in which Mr. Scott alleges."

A second statutory interim hearing was held on December 1, 1997. The hearing summary indicates that petitioner was represented at this proceeding by Richard Whitmire, a public health service employee detached to the B.O.P. at USP Lewisburg, and that three institutional misconducts for drug use, to which petitioner plead guilty, were considered. A Notice of action dated December 22, 1997 was issued which advised petitioner that the Commission had found that he committed the three drug related violations, rescinded his presumptive parole date of 9/1/2003 and ordered him to continue to a presumptive parole date of 8/31/2004, requiring service of twelve additional months.

Petitioner filed a habeas corpus 7/16/97 petition seeking either an evidentiary hearing on the merits of his innocence in light of the affidavits of Scott and Wilder, copies of which he attached to his petition, or his immediate release.

The response to the petition indicates that "the record does not definitively demonstrate" that petitioner's May 28, 1997 request for reopening was reviewed and may have been inadvertently placed in his file without any review. Accordingly,

when the Commission's attention was directed to that request by the initiation of the 7/16/97 habeas corpus action, an expedited review was conducted. Upon review, it was determined that the Scott affidavit did not warrant the reopening of petitioner's case because "...the affidavit lacks credibility...".

Specially, the reasons given for this determination, were in part, as follows:

My view is that the affidavit lacks credibility, because Scott claims he was only saying what he thought the examiner wanted to hear, but he had also admitted to the FBI his participation in the April 26 robbery, and had told the FBI that Crosby had participated in that robbery. In addition, other evidence links Crosby to Scott and Wilder (the third robber), specifically a piece of paper found during a search of Wilder's home with Crosby's phone number on it, and the information provided by an FBI informant testified to by the FBI agent) that Crosby had participated in the robberies with persons he had been incarcerated with. (Crosby had been incarcerated with Scott!) I therefore recommend against reopening.

On February 10, 1999, the 7/16/97 habeas corpus petition seeking relief was denied. Petitioner raises the claim that he is "in custody" in violation of the constitution, laws or treaties of the United States and claims "Due Process" violations of the Fifth and Sixth Amendments.

#### ARGUMENT

Petitioner urges that the Parole Commission:

1. August 10, 1993, petitioner's parole officer in-

formed the Commission that he had had violated the conditions of his parole and recommended that a violators warrant for his arrest be issued. Specifically, the Commission was advised that petitioner was implicated, according to information obtained by the FBI, in a number of bank robberies between April and July, 1993.

2. As a result petitioner was charged with violating the conditions of his parole as follows: committing armed bank robbery; failing to notify his parole officer of his criminal involvement; associating with persons having a criminal record and/or engaged in criminal activity.

3. In a letter dated October 5, 1993, petitioner was notified that probable cause had been found on the following charges: armed bank robberies; failure to notify the U.S. Parole Officer of criminal involvement; association with persons having a criminal record/engaged in criminal activity.

4. On December 1, 1993, the Commission (Hearing Examiner) concluded that petitioner had committed bank robbery as well as the other offenses charge and recommended that his parole be revoked.

5. On December 16, 1993, the Commission issued a Notice of Action. The Notice indicated that the Commission had found as a fact that petitioner had violated the conditions of his

parole as charged based upon the testimony of agent Graves, Scott and the documentation submitted by the U.S. Parole Officer dated revoked.

6. In support of its decision to require service of 120 months, an amount above petitioner's guideline range of 60 - 70 months, the Commission stated as follows:

**Your parole violation behavior has been rated as new criminal conduct of category five severity because it involved bank robbery.**

7. Petitioner appealed this decision to the National Appeals Board (Appeals Board) on the ground that "...there was insufficient evidence to support the findings that [he] robbed a bank on April 26, 1993.

8. On July 27, 1994, the Appeals Board issued a Notice of Action on appeal affirming the Commission's decision. (Emphasis added) Petitioner has maintained his innocence from the beginning.

The question presented is whether the Due Process Clause of the Fourteenth and Fifth Amendments require that a factual determination authorizing a guilty findings for an offense of bank robbery be made by a jury on the basis of proof beyond a reasonable doubt or by the Parole Commission?

Petitioner argues that the Due Process Clause of the United

parole as charged based upon the testimony of agent Graves, Scott and the documentation submitted by the U.S. Parole Officer dated revoked.

6. In support of its decision to require service of 120 months, an amount above petitioner's guideline range of 60 - 70 months, the Commission stated as follows:

**Your parole violation behavior has been rated as new criminal conduct of category five severity because it involved bank robbery.**

7. Petitioner appealed this decision to the National Appeals Board (Appeals Board) on the ground that "...there was insufficient evidence to support the findings that [he] robbed a bank on April 26, 1993.

8. On July 27, 1994, the Appeals Board issued a Notice of Action on appeal affirming the Commission's decision. (Emphasis added) Petitioner has maintained his innocence from the beginning.

The question presented is whether the Due Process Clause of the Fifth and Sixth Amendments require that a factual determination authorizing a guilty findings for an offense of bank robbery be made by a jury on the basis of proof beyond a reasonable doubt or by the Parole Commission?

Petitioner argues that the Due Process Clause of the United

States Constitution requires that the finding of guilt to bank robbery upon which his parole violation sentence was based must be proved to a jury beyond a reasonable doubt, *In Re Winship*, 397 U.S. 358 (1970). See also *Apprendi v. New Jersey*, \_\_ U.S. \_\_, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

"Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227 (1999). In the instant case the issue of fact that increase the maximum penalty for a crime is moot because not one of the alleged participants was arrested by the FBI and charged with committing the 4/26/93 bank robbery, no criminal complaint was filed, no indictment filed, and the case was not submitted to a jury and proven beyond a reasonable doubt. Any sentence under these circumstances constitute an increase maximum penalty for a crime that the petitioner did not commit.

Additionally, the Commission used its findings that the petitioner had committed bank robbery to establish the petitioner's guideline range of 60 - 72 months. The Commission used the same findings to increase the maximum penalty above the guidelines range maximum of 72 months to 120 months stating as follows:

"Your parole violation behavior has been rated as new criminal conduct of category five severity because it involved bank robbery."

At stake in this case are Constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "Due Process of law", Amendment 5, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury", Amendment 6. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged beyond a reasonable doubt." United States v. Gaudin, 515 U.S. 506, 510 (1995); see also Sullivan v. Louisiana, 508 U.S. 275, 278 (1993); Winship, 397 U.S. at 364 ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). See Apprendi v. New Jersey, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Petitioner argues that he is denied Constitutional protection when he was denied a jury determination that he is guilty of the crime with which he is charged. When the Hearing Examiner's (the Commission) finding based on a mere preponderance of the evidence authorizes a 10 years sentence, it can hardly be said that the potential of one's sentence of 10

years for parole violation (bank robbery) has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of Constitution significance.

Moreover, there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the Commission to find the required fact under a lesser standard of proof.

The Supreme Court Justices in a majority ruling in *Apprendi v. New Jersey* endorses the following principle: "It is unconstitutional for a legislature to remove from the jury the assessment of acts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Apprendi v. New Jersey*, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); quoting *Jones v. United States*, 526 U.S. at 252-253.

Petitioner argues that the same rule of law is applicable to the Parole Commission whereas it is unconstitutional for a legislature to remove from the jury the assessment of acts than permit the same facts to be used by the Parole Commission to increase the proscribed range of penalties to which a criminal



defendant is exposed.

### DUE PROCESS

Petitioner petitioned the United States District Court for the Middle District of Pennsylvania for writ of Habeas Corpus Relief pursuant to 28 U.S.C. § 2241, which was denied.

The District Court's standard of review is limited to an abuse of discretion, Green v. U.S. Parole Commission, 749 F.Supp. 650, 563 (M.D.Pa. 1990);

It is well-established that a federal district court's review of a Parole Commission's decision is restricted to an 'abuse of discretion' standard-determining whether there exists a national basis in the record for the Commission's action. Campbell v. U.S. Parole Commission, 7704 F.2d 106, 109-10 (3rd Cir. 1983)(quoting Zannino v. Arnold, 531 F.2d 687, 291 (3rd Cir. 1976)("our inquiry in reviewing a Parole Commission decision is only whether there is a rational bases in the record for the Board's conclusions embodied it its statement of reasons.").

Petitioner urges that there is no rational basis in the record for the Parole Commission's decision or the District Court's reliance thereof. A later decision by the Third Circuit citing Gambino v. Morris, Civil Action No. 96-4559 (criminal no. 84-98) (April, 2000), plus the Supreme Court ruling citing Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) warrant an evidentiary hearing to determine whether the rule of law from the recent Court decisions are applicable in the instant case to support the "Due

Process" claim.

The District Court reviewed the evidence in the record to see if it was rationally related to the Parole Commission's decision. Additionally a review of the record before it, the Court is of the view that the Commission's decision should not be disturbed as there is a rational basis in the record to support it. The Court found that the Parole Commission relied on three facts to support its findings that petitioner committed the offense of bank robbery: (1) FBI agent Graves' testimony that petitioner had been implicated in bank robberies in association with persons he had previously been incarcerated with by an informant; (2) a search of Wilder's residence had uncovered papers containing petitioner's current phone number; and (3) Scott's testimony that petitioner had participated with him and Wilder in the April, 1993 bank robbery.

The petitioner urges this Court to analyze each of these three factors separately in comparison with the Third Circuit's ruling citing Gambino v. Morris, Civil Action no. 96-4559 - Criminal no. 84-98 (April - 2000).

Petitioner argues that, first, the testimony from FBI agent Graves did not support the Parole Commission's conclusion. The implication by an informant of petitioner in bank robberies in association with persons he had previously been incarcerated with is vague. This fact suggests that the petitioner, Wilder,

and Scott had a past which included bank robbery and happened to be incarcerated at the same federal prison. It does not link petitioner himself to the crime.

The agent's testimony is not that the petitioner participated in the bank robbery but that he was implicated in bank robberies by an informant; meaning that if the petitioner's name is mentioned in any capacity related to the crime, he has been implicated. In the Gambino v. Morris case, the Parole Commission relied on a reliable, but unnamed, informant who identified Mr. Gambino as a member of the Gambino family of La Cosa Nostra, to support its findings that Mr. Gambino was a member of a crime family, Gambino v. Morris, 134 F.3d 156, 161 (3rd Cir. 1998).

The Third Circuit found that this "bald assertion" from an "unverified source" did not supply a rational basis to deny parole (Id. at 163). Finally, the Court found that the hearsay allegations of the "reliable, unnamed informant" were similarly flawed. (Id.) Although the Court acknowledged that the Parole Commission could consider hearsay, see Campbell, 704 F.2d at 109-110, it found that in the context of this case, this allegation was not sufficient.

Petitioner argues that the rule of law by the Third Circuit (Id.) in Gambino v. Morris is applicable in the instant case which supports the instant "Due Process" claim with the guarantee

to equal protection of the law.

Second, the Commission relied on the fact that papers containing petitioner's current phone number was uncovered after a search of Wilder's residence. The petitioner does not dispute his association with Wilder nor the fact that Wilder had his current phone number.

In the parole hearing, the petitioner stated that he was subject to drug aftercare condition of parole. One of the conditions of the aftercare was to attend mandatory group meetings, those group meetings were made up of men on federal parole or they were mandated to the drug program by the Courts. Wilder was a member of my aftercare group. Additionally, the group was modeled after 12th step programs, in that, the group members were required and encouraged to exchange phone numbers to form a support network for themselves. The stated reasons are the basis for petitioner's association with Wilder and the reason that his current phone number was in Wilder's papers at his residence. Those reasons are simply insufficient cause to subject the petitioner to an extra 10 years of incarceration and to create a rational basis for the Parole Commission's decision.

In Gambino v. Morris the Parole Examiner reviewed as evidence the address book found in Gambino's home as sufficient evidence to deny Gambino parole. The Third Circuit findings were that although the address book had the names and phone

number of alleged organized crime figures, the address book is insufficient evidence to create a rational basis for the Parole Commission's decision to deny Gambino parole.

Petitioner argues that the same rule of law is applicable in the instant case through the Due Process Clause of the Constitution of the United States and its guarantees of equal protection of the law.

Finally, the Commission relied on Scott's testimony that petitioner had participated with him and Wilder in the April, 1993 bank robbery.

Emphasis added, the credibility of Scott's testimony. The petitioner is well aware of the Court's limited scope of review and the deference which it must afford to the fact-finder's determination of credibility. However, if there is no valid basis for an adverse credibility determination, and if the resulting determination, is no more than speculative belief, the latter cannot stand. Gambino v. Morris, Civil Action no. 95-4559, at 21 criminal no. 84-98 (April - 2000).

In the instant case there is no evidence that the petitioner or Wilder participated in the April, 1993 bank robbery. The Parole Commission relied solely on the testimony of Scott. Scott's testimony was not creditable enough for the FBI to arrest the petitioner or Wilder, not creditable enough to file a crimi-

nal complaint, jury indictment in this case. Scott's testimony forms no rational basis for a conclusion that the petitioner committed a crime of bank robbery. The Parole Commission acted arbitrarily and capriciously.

CONCLUSION

For the reasons stated above, the petitioner prays this Petition for Writ of Habeas Corpus is granted.

Keith Crosby

Keith Crosby  
#29802-066  
petitioner pro se

CERTIFICATE OF SERVICE

The undersigned hereby declares that a true copy of the foregoing "Memorandum In Support of Petitioner for Writ of Habeas Corpus" was served on the respondents by mailing same via first class mail, to:

JANET RENO  
ATTORNEY GENERAL OF THE UNITED STATES  
UNITED STATES DEPARTMENT OF JUSTICE  
16TH STREET & CONSTITUTION AVE., N.W.  
WASHINGTON, D.C. 20530

on this 20<sup>th</sup> day of NOVEMBER 2000.

/s/ Keith Crosby #29802-066  
KEITH CROSBY  
Petitioner pro se